

1 KAREN P. HEWITT  
 United States Attorney  
 2 CARLOS ARGUELLO  
 Assistant U.S. Attorney  
 3 California State Bar No. 157162  
 United States Federal Building  
 4 880 Front Street, Room 6293  
 San Diego, California 92101  
 5 Telephone: (619) 557-6252  
 Facsimile: (619) 235-2757

6 Attorneys for Plaintiff  
 7 United States of America

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

|                                |   |                                     |
|--------------------------------|---|-------------------------------------|
| 10 UNITED STATES OF AMERICA,   | ) | Criminal Case No. 08cr0303BEN       |
|                                | ) |                                     |
| 11 Plaintiff,                  | ) | DATE: September 12, 2008            |
|                                | ) | TIME: 2:00 p.m.                     |
| 12 v.                          | ) |                                     |
|                                | ) | Honorable Roger T. Benitez          |
| 13 JUAN ALONSO ROJO-CASTANEDA, | ) | Courtroom 3 (4 <sup>th</sup> Floor) |
|                                | ) |                                     |
| 14 Defendant.                  | ) | UNITED STATES' MOTIONS              |
|                                | ) | <u>IN LIMINE</u> TO:                |
| 15                             | ) |                                     |
|                                | ) | 1) ADMIT EXPERT TESTIMONY;          |
| 16                             | ) | 2) ADMIT DEMEANOR EVIDENCE;         |
|                                | ) | 3) LIMIT CHARACTER EVIDENCE; AND    |
| 17                             | ) | 4) COMPEL DISCOVERY.                |
|                                | ) |                                     |
| 18                             | ) | TOGETHER WITH STATEMENT OF          |
|                                | ) | FACTS AND MEMORANDUM OF             |
| 19                             | ) | POINTS AND AUTHORITIES              |

20  
 21 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through  
 22 its counsel, Karen P. Hewitt, United States Attorney, and Carlos  
 23 Arguello, Assistant United States Attorneys, and hereby files its  
 24 motions in limine in the above-captioned case. These motions are  
 25 based upon the files and records of this case, together with the  
 26 attached statement of facts and memorandum of points and authorities.  
 27  
 28

## I.

STATEMENT OF FACTSA. PRIMARY INSPECTION AT THE WESTMORLAND CHECKPOINT

On Wednesday, January 9, 2008, at approximately 3:20 a.m., Defendant Juan Alonso Rojo-Castaneda ("Defendant") drove a grey Kenworth tractor trailer bearing California license plates to the fully operational, United States Border Patrol checkpoint on Highway 86 in Westmorland, California. Defendant was hauling an approximately 53-foot semi-trailer. Defendant was the registered owner and sole occupant of the tractor trailer.

United States Border Patrol Agent Freddy Carretero was working at the primary inspection area at the checkpoint when Defendant's tractor trailer approached. The agent asked Defendant routine inspection questions. Defendant, age 32, stated he was a lawful permanent resident of the United States and presented his permanent resident alien card.

The agent then asked Defendant what type of cargo he was transporting. Defendant responded that the trailer was empty and that he was driving to Bakersfield. During this brief questioning, Agent Carretero observed that Defendant appeared extremely nervous. The agent noticed that Defendant seemed fidgety, avoided eye contact, appeared eager to answer questions, and asked to be allowed to continue on his way.

While Agent Carretero spoke with Defendant at the primary area, Border Patrol Agent Vega, a canine handler, was working in the pre-primary inspection area at the checkpoint with his assigned canine. Agent Vega noticed the tractor trailer and had his canine conduct a sniff of both the tractor trailer and semi-trailer. His assigned

1 canine Hoby alerted to the rear doors of the semi-trailer. At this  
2 point, Agent Vega signaled to Agent Carretero to refer Defendant and  
3 his truck to the secondary inspection area. As a result, Defendant  
4 was referred to the secondary location.

5 **B. SECONDARY INSPECTION AT THE CHECKPOINT**

6 In the secondary inspection area, Agent Vega approached  
7 Defendant and asked him what he had in the semi-trailer. Defendant  
8 replied that it was empty. Agent Vega then asked Defendant if he  
9 would consent to a search of the semi-trailer. Defendant consented  
10 to a search and opened the rear doors of the semi-trailer. Agent Vega  
11 looked inside the semi-trailer and saw several plastic crates double-  
12 stacked together. Within moments, the canine alerted to the crates.

13 Border Patrol agents eventually removed eighteen (18) bales of  
14 packages from within two crates located at the front end of the semi-  
15 trailer. The contents of one of the bales field-tested positive for  
16 marijuana. The gross weight of all the packages was 168 kilograms or  
17 369 pounds. Agents subsequently placed Defendant under arrest for the  
18 illegal possession of narcotics.

19 **C. DEFENDANT'S POST-ARREST STATEMENTS**

20 United States Drug Enforcement Administration Special Agent  
21 Richard Slattery and Task Force Officer Pompeyo Tabarez assumed the  
22 investigation of this case. Officer Tabarez advised Defendant of his  
23 Miranda rights in the Spanish language with Special Agent Slattery  
24 serving as a witness. Defendant stated he understood his rights and  
25 agreed to speak with the agents.

26 Defendant denied knowledge of the marijuana found in his semi-  
27 trailer. Defendant confirmed he owned the tractor trailer. He told  
28 the agents that he worked for Juarez Brothers Trucking in Bakersfield,

1 California. He gave the name of David Hernandez as the dispatcher.  
2 Defendant claimed that on January 8, 2008, the day before his arrest,  
3 he delivered a load of carrots from Grimmway Farms in Bakersfield to  
4 the El Centro Cold Storage warehouse in El Centro, California.

5 Defendant stated that his semi-trailer was unloaded at the  
6 storage warehouse at approximately 11:45 p.m. Thereafter, a forklift  
7 operator named "El Gordo" loaded his semi-trailer with empty plastic  
8 bins. Defendant remained inside the tractor trailer during that time  
9 and could not see "El Gordo" loading his trailer.

10 After leaving the storage warehouse, Defendant drove his tractor  
11 trailer to Westmorland. Defendant claimed he intended to drive north  
12 to Bakersfield in order to deliver the plastic bins to Grimmway Farms.  
13 Defendant drove a distance, took a short nap, and then proceeded to  
14 the Westmorland checkpoint.

15 **D. FOLLOW-UP INVESTIGATION**

16 Special Agent Slattery conducted follow-up investigation based  
17 on Defendant's statements. He did the following:

18 1. Agent Slattery spoke with Richard Hiura, Director of  
19 Processing and Packaging for River Ranch Fresh Foods in El  
20 Centro, California. Mr. Hiura confirmed that River Ranch  
21 received a shipment of carrots from Grimmway Farms but it  
22 was on January 9, 2008, and the shipment arrived at  
23 approximately 11:15 a.m. He stated shipments of carrots  
24 only arrive in the morning hours and not in the evening.  
25 Mr. Hiura also added no such person by the name of "El  
26 Gordo" worked at their facility.

27 2. Agent Slattery obtained a bill of lading from River Ranch  
28 Fresh Foods which stated that the January 9, 2008 shipment

1 of carrots was delivered by a driver named Gilbert Ramos  
2 and not Defendant.

3 3. Agent Slattery was informed by River Ranch representatives  
4 that they do not load bins into trailers as described by  
5 Defendant. Moreover, River Ranch uses its own semi-  
6 trailers to transport carrots, not the personal trailers of  
7 the drivers.

8 4. Agent Slattery spoke with David Hernandez, a dispatcher  
9 employed by Juarez Brothers Trucking in Bakersfield,  
10 California. Mr. Hernandez verified Defendant worked for  
11 them but had not made any deliveries for them since  
12 November 2007.

13 **II.**

14 **POINTS AND AUTHORITIES**

15 **A. EXPERT TESTIMONY**

16 If specialized knowledge will assist the trier-of-fact in  
17 understanding the evidence or determining a fact in issue, a qualified  
18 expert witness may provide opinion testimony on the issue in question.  
19 Fed.R.Evid. 702. The trial court has broad discretion to admit expert  
20 testimony. See, e.g., United States v. Alonso, 48 F.3d 1536, 1539  
21 (9th Cir. 1995). An expert may base his/her opinion on hearsay or  
22 facts not in evidence where the facts or data relied upon are of the  
23 type reasonably relied upon by experts in the field. Fed.R.Evid. 703.  
24 In addition, an expert may provide opinion testimony even if it  
25 embraces an ultimate issue to be decided by the trier-of-fact.  
26 Fed.R.Evid. 704.

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1                   **1. Identity of Substance as Marijuana**

2           Unless the parties enter into a stipulation involving the  
3 marijuana seized in this case, the Government intends on calling DEA  
4 Senior Forensic Chemist, Terry V. Caldwell, to testify as to the  
5 identity of the substance seized from the vehicle in this case. The  
6 Government expects him to testify that laboratory examinations  
7 confirmed that the contraband was marijuana, a Schedule I Controlled  
8 Substance. This testimony bears directly on an element of the charged  
9 offense: that marijuana is a prohibited drug.

10          This testimony is permitted under Rule 702 of the Federal Rules  
11 of Evidence, which allows witnesses qualified as experts to testify  
12 as to scientific or technical knowledge that "will assist the trier  
13 of fact to understand the evidence." See United States v. Cruz, 127  
14 F.3d 791, 801 (9th Cir. 1997) (DEA forensic chemist properly  
15 established as expert to identify nature of controlled substance);  
16 United States v. Burden, 497 F.2d 385, 387 (8th Cir. 1974) (forensic  
17 DEA chemist, whose educational background and experience were  
18 established, was properly allowed to testify as an expert on the  
19 various tests performed on a substance to confirm that it was  
20 marijuana).

21                   **2. Value of the Drugs**

22          The Government intends to present expert testimony about the  
23 quantity, wholesale value, and street value of the marijuana seized  
24 in this case. The quantity and value of the marijuana  
25 circumstantially demonstrate that the Defendant knew that the truck  
26 he drove contained marijuana, and that the Defendant constructively  
27 possessed the marijuana with the intent to distribute it. Knowledge  
28 and intent are elements of the offense charged in this case.

1 The Ninth Circuit permits the use of such expert testimony. In  
2 United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994), for  
3 instance, the Defendant was charged with the importation of heroin  
4 after he and others attempted to smuggle approximately 2.5 pounds of  
5 heroin across the border. At trial, the Government introduced the  
6 expert testimony of a DEA agent as to the street value of the heroin,  
7 assuming it had been cut repeatedly and sold on the street. The Ninth  
8 Circuit held that agents can testify to the street value of narcotics  
9 and that counsel can argue reasonable inferences from such testimony.  
10 See also United States v. Savinovich, 845 F.2d 834, 838 (9th Cir.  
11 1988) (price, quantity, and quality of narcotics is relevant to  
12 defendant's intent to distribute).

### 13 3. Personal Use Versus Distributable Amount

14 Finally, the Government intends to elicit expert testimony from  
15 an Immigration and Customs Enforcement or D.E.A. Special Agent to  
16 establish that the quantity of marijuana found in the vehicle driven  
17 by Defendant is a distributable, rather than a personal use amount.  
18 See United States v. Tavakkoly, 238 F.3d 1062, 1067 (9th Cir. 2001)  
19 (undisputed expert testimony that 1.35 kg of opium was inconsistent  
20 with possession for personal use was relevant to prove defendant's  
21 intent to distribute); United States v. Alatorre, 222 F.3d 1098, 1104-  
22 05 (9th Cir. 2000) (expert testimony properly admitted to establish  
23 that quantity of marijuana was distributable amount, rather than just  
24 personal use amount).

### 25 B. DEMEANOR EVIDENCE SHOULD BE ADMITTED

26 Evidence regarding a defendant's demeanor and physical appearance  
27 is admissible as circumstantial evidence that is helpful to the jury's  
28 determination as to whether a defendant knew drugs were concealed in

1 the vehicle. Fed.R.Evid. 701; United States v. Hursh, 217 F.3d 761  
2 (9th Cir. 2000) (holding that a jury may consider a defendant's  
3 nervousness during questioning at Calexico port of entry); United  
4 States v. Fuentes-Cariaga, 209 F.3d 1140, 1144 (9th Cir. 2000)  
5 (holding that it is within the ordinary province of jurors to draw  
6 inferences from an undisputed fact such as a defendant's nervousness  
7 at Calexico port of entry); United States v. Barbosa, 906 F.2d 1366,  
8 1368 (9th Cir. 1990) (holding that a jury could infer guilty knowledge  
9 from a defendant's apparent nervousness and anxiety during airport  
10 inspection); Unites States v. Lui, 941 F.2d 844, 848 n.2 (9th Cir.  
11 1991) (holding that a jury could consider guilty knowledge from a  
12 defendant's acting disinterested during airport inspection).

13 Here, witnesses for the United States may properly testify to  
14 Defendant's demeanor and physical appearance, as they have personal  
15 knowledge based upon their observations of Defendant.

16 **C. CHARACTER EVIDENCE**

17 The Government anticipates that the defense will call character  
18 witnesses to testify on behalf of the Defendant. The Court should  
19 limit any such evidence to opinion or reputation testimony about the  
20 defendant's general character for lawfulness. See Fed.R.Evid.  
21 404(a)(1), 405(a), and 803(21); United States v. Diaz, 961 F.2d 1417,  
22 1419-20 (9th Cir. 1992)(district court properly excluded testimony  
23 about defendant's "character trait for [not] being prone to large-  
24 scale drug dealing").

25 In introducing positive character evidence, Defendant must  
26 restrict himself to evidence regarding "law abidingness" and honesty.  
27 Defendant may not introduce evidence concerning specific instances of  
28 good conduct, lack of a prior record, or propensity to engage in



1 specific good acts. United States v. Hedgecorth, 873 F.2d 1307, 1313  
2 (9th Cir. 1987) ("[W]hile a defendant may show a characteristic for  
3 lawfulness through opinion or reputation testimony, evidence of  
4 specific acts is generally inadmissible.") (citations omitted); United  
5 States v. Barry, 814 F.2d 1400, 1403 (9th Cir. 1987); Gov't of Virgin  
6 Islands v. Grant, 775 F.2d 508, 512 (3d Cir. 1985) ("[T]estimony that  
7 one has never been arrested is especially weak character evidence.").

8 **D. UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY**

9 As of the date of the preparation of these motions, Defendant has  
10 produced no reciprocal discovery. The United States requests that  
11 Defendant comply with Rule 16(b) of the Federal Rules of Criminal  
12 Procedure, as well as Rule 26.2 which requires the production of prior  
13 statements of all witnesses, except for those of Defendant. Defendant  
14 has not provided the United States with any documents or statements.  
15 Accordingly, the United States will object at trial and ask this Court  
16 to suppress any evidence at trial which has not been provided to the  
17 United States.

18 **III.**

19 **CONCLUSION**

20 For the foregoing reasons, the Government respectfully  
21 requests that the Court grant its motions in limine.

22 DATED: September 8, 2008

23 Respectfully submitted,

24 KAREN P. HEWITT  
25 United States Attorney

26 s/Carlos Arguello

27 CARLOS ARGUELLO  
28 Assistant U.S. Attorney  
carlos.arguello2@usdoj.gov